ORIGINAL ARTICLES

MEDICAL EXPERT TESTIMONY.

Something like a year ago, on motion by the writer, the council of the Los Angeles Medical Association appointed a committee to confer with the Committee on Revision of Laws of the Los Angeles Bar Association concerning legislation which should effect certain reforms in the appointment and general status of the medical expert in this commonwealth.

On March 18, 1910, a symposium on this subject was given at a meeting of the County Medical Association. Distinguished members of the bench and bar were invited to participate and the papers of the contributors to the symposium, representing views of the two professions, are published in this number of the Journal.

The committee is especially gratified at the sincere and cordial spirit of co-operation which members of the bar throughout the state have manifested in this subject. Our own profession, too, has shown equal earnestness in its determination to effect a reform in the status of the medical expert. At the Sacramento meeting of the State Medical Society, resolutions were unanimously adopted recognizing the great need of reform and endorsing any practicable statutory measures which shall improve present conditions.

The committee at Los Angeles feels it has a most efficient and potent executive helper in the person of Mr. Oscar C. Mueller, chairman of the committee on revision of laws of the local Bar Association. His hearty sympathy and co-operation have meant everything to us, and the committee feels our eventual success at Sacramento will be very largely due to the exceptional executive ability Mr. Mueller is showing in the development of this reform.

The committee assures the profession of the state of its high appreciation of the loyalty shown it everywhere, and invites the active personal endorsement of the bill which shall later be presented to the Legislature on medical expert testimony. This bill will be framed by officially delegated committees of the Los Angeles and San Francisco Bar and Medical Associations in joint conference, and it will go to Sacramento backed by the united influence of these organizations.

(Signed by the Committee.)

THOMAS J. ORBISON,
F. C. E. MATTISON,
ANDREW STEWART LOBINGIER,
Chairman.

REMARKS OF OSCAR C. MUELLER, CHAIRMAN OF COMMITTEE ON AMENDMENT OF LAWS OF THE LOS ANGELES BAR ASSOCIATION, ON "MEDICAL EXPERT TESTIMONY."

The present status of expert testimony is unquestionably a disgrace to both the legal and medical professions, and the earnest endeavors of Dr. Lobingier to free these professions from this stigma and have California pioneer remedial legislation, is indeed laudable. The testimony of the alienists in the Thaw case, for example, amounted to a bargain and sale of evidence. On account of the great wealth of the defendant's family, it was generally conceded that he employed the expert witnesses to argue the subject of the various forms of dementia, while on behalf of the state of New York, the expert was introduced for the purpose of showing that Thaw's actions were not caused by a diseased brain. Now the tables are turned, and to get Thaw out of the asylum his physicians testify that he is of sound mind.

NECESSITY OF REFORM.

"Believe no expert," says the cynic Bar,
Yet how unjust—all alike deride.
This swears white black; but straightway—haud impar,
An equal sage approves the candid side."

As long ago as 1874, Professor John Ordronaux declared: "There is a growing tendency to look with distrust upon every form of skilled testimony. Fatal exhibitions of scientific inaccuracy and self-contradiction cannot but weaken public confidence in the value of all such evidence. . . . Some remedy is called for, both in the interest of humanity and justice."

A judge of the Supreme Court of the United States declared in a leading case that "experience has shown that opposite opinions of persons professing to be experts may be obtained to any extent; and it often occurs that not only days but even weeks are consumed in examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting time and wearing the patience of both the court and jury, and perplexing instead of elucidating the questions involved in the issue."

In a celebrated case in New York City, the expert testimony required six days for its intruduction. Eminent surgeons were called and learned counsel examined them. When the judge charged the jury, he told them to disregard all of the expert testimony as the same was too contradictory!

In the famous Leutgert murder case in Chicago, the bones of the victim were discovered in a vat. Some of the most widely known osteologists of the age strenuously insisted that the bones in question did not belong to a human being, but belonged to a hog!

In another well-known case three doctors testified regarding the mental capacity of a man. Two of the doctors of vast experience differed radically. The third was a young practitioner, and he was believed while the other testimony was wholly disregarded, because of his pronounced impartiality. This would emphasize the necessity of a commission, which I will mention later on.

Another instance of contradiction was that of the trial of the Le Page murder case. Blood-stained garments had been subjected to chemical and microscopical anaylsis. Three doctors called by the state all testified that blood corpuscles could be restored to perfect shape after the lapse of many years, and that dried human blood can be distinguished from that of domestic animals. On the other hand, two leading physicians of Montreal testified positively

that after a period of two weeks it was impossible to restore corpuscles to their original size or to distinguish with any certainty human blood from that of other mammalia.

Dr. R. T. Williams of England shows the extent to which expert testimony could be introduced in an amusing manner. The question was one concerning condition of a witness. Dr. Williams said that he was drunk, and belonged to a class of drunkenness which he classified as "mellow, recovering from irritation." In response to a question by the magistrate, regarding the different classes of inebriety, he said: "As a matter of fact, drunkenness consisted of seven stages or classes: irritable, mellow, pugnacious, affectionate, lachrymose, sullen, and, if the doses were large enough, collapse and death."

WHO ARE EXPERTS?

A witness who is shown to the satisfaction of the court to be a competent physician or surgeon, may state facts known to qualified members of his profession as to the effect, extent and tendency or professional knowledge regarding any disease; the symptoms of a given disease in body or mind; the usual period for recovery; what certain medical facts indicate; the effect commonly produced by age, death, disease, drugs, emotion or injury are all subjects of expert testimony.

The qualification of an expert may be controlled by statute. This was decided in a Wisconsin case, and it would be well to incorporate a section relating to that subject in statutes to be presented to the next Legislature.

USE OF BOOKS.

In the matter of the introduction of medical books, several courts have taken the position that the books are not admissible in testimony, while others hold that the same are competent.

In Iowa, there is, for instance, a conflict between the State and Federal Court on this subject. The State Court will permit the reading of medical books to the jury, while the Federal Court in the same state has held that such evidence cannot be introduced.

In the state of New Hampshire an action was brought which involved the question of the setting of a fractured bone. In the opening address to the jury one of the attorneys offered to exhibit to them an engraving in a medical book to illustrate his meaning. The trial court refused to allow this, and this ruling was sustained in the Supreme Court, the Justice of this latter tribunal saying: "The engraving that was offered as a chalk alone was unobjectionable. The witness may use to illustrate his meaning and the counsel to illustrate his case any chalk, whether engraved or more roughly sketched, whether made with a pen or a pencil. If the diagram alone were offered and offered simply as a chalk, we see no objection to it. As the case shows, this was used as an engraving in a medical book. That makes it improper, because it gives it undue importance with the jury. The jury should not know that it was in a medical book or a law book, or what the book was that contained it."

Several years ago a criminal case arose in California in which the facts were as follows: The District Attorney was allowed over the objection of the defendant to read, as a portion of his argument, from a book called "Brown's Medical Jurisprudence on Insanity." After an extensive review of the authorities, the Supreme Court held that the lower court erred in permitting such reading, and the verdict of the jury was set aside.

Just the opposite view is taken in a criminal case in Indiana, and in a Texas case the court even excluded the United States Medical Dispensatory.

FEES OF EXPERTS.

In a suit for damages against the city of Springfield, a physician, subpœnaed as a witness by the defendant, was asked a hypothetical question which he refused to answer, and gave this reason: "An expert witness is entitled to a different and greater compensation than an ordinary witness is allowed, and an expert is not required to give expert testimony without compensation as an expert unless a reasonable compensation shall have been paid or provided for. My reasonable fee for an expert or professional opinion in this case is $10.00. I have not been paid nor offered anything for compensation for my expert or professional opinion in the case, nor has said compensation been in any way promised to me or provided for. On the contrary, it has been expressly refused. Therefore, I decline to testify until such fee is provided for."

Held, that the doctor was in contempt by his refusal, and properly punishable therefor.

Now, really don't you think he was guilty of contempt for asking only $10.00 for his services?

Dr. Hammond of New York received a witness fee of $500.00 from the state in one case. His preparation for the trial occupied considerable length of time; his attendance in court involved many days and his testimony was of the most important nature. This fee was attacked by the defendant in the Supreme Court upon the ground that the physician was prejudiced and in favor of the state by reason of its size, but the Supreme Court of New York did not agree with this contention.

Upon the subject of compensation of expert witnesses, Judge Foster, a well-known law writer, says: "He is not a witness in the ordinary sense unless called merely to testify to some fact which he has observed—for then he is not an expert. His position and office is that of a sworn interpreter of science to the court."

In some states it is held that he is entitled to no more than an ordinary witness fee. In other states the direct contrary is the rule.

HYPOTHETICAL QUESTIONS.

In the Thaw case six experts were examined; most of them had a national reputation, and were called upon to answer a hypothetical question consisting of fifteen thousand words. There is one hypothetical question on record which is longer—containing twenty thousand words, required two hours to read it, and was propounded to Dr. Jelley, a Boston expert on insanity, in the famous Tuckerman will contest. It involved the question of the capacity of the testator. The learned doctor an-

swered the twenty-thousand-word hypothetical question in three words, "I don't know."

The opinion of experts are to be regarded as conclusive by the jury only when the evidence and facts deducible therefrom are undisputed, and the case concerns a matter of science or specialized art or other matter of which the layman can have no knowledge. In a Wisconsin case, the expert was examined by way of a hypothetical question concerning the cause of a death. His answer was: "I judge the deceased died from suffocation; asphyxia, sometimes called." He was then asked that if in addition to certain appearances there were found marks on her throat—what would his conclusion be? He answered: "That she died of strangulation." The following question was then put to the witness: "Do you know from books or otherwise whether death is ever produced from strangulation without leaving marks on the throat—that is your own personal observation?" This question was objected to. The objection was overruled and exception taken. He answered: "In Taylor's Jurisprudence such cases are recorded." Question: "In standard medical works?" Answer: "Yes, sir." Question: "Is Taylor's standard?" Answer: "Yes, sir."

The court said: "It seems to us the court erred in permitting Dr. Cody to testify as to what was said in standard medical works upon the subject of strangulation, and what effects would be produced upon the body of the deceased when death resulted from such cause."

In most states the rule is the same. However, Iowa and Alabama admit such evidence.

PHYSICAL EXAMINATION.

Upon the subject of physical examination, the Supreme Court of California has recently held that a plaintiff in a personal injury case must submit to such examination. There ought to be statutory regulations on this subject. There is a conflict of decisions all along the line. A Michigan case holds that no anesthetic or drug should be used in such examination. In Wisconsin, the court took the position that the plaintiff should not be compelled to submit to the use of surgical instruments; while in a railroad case in Kansas the court stated that the plaintiff could be compelled to submit to an injection of a drug in his injured eye to dilate the pupil. In a damage suit which went before the Supreme Court of the United States, the court used this language:

"The inviolability of the person is invaded by a compulsory stripping and exposure. To compel one, especially a woman, to lay bare the body without lawful authority is an indignity, an assault and a trespass."

In the California case, *Johnson* vs. *S. P. Co.*, 150 Cal., 535, it was definitely settled that the plaintiff had to submit to a physical examination, and the court there reviewed the authorities relating to examination of experts, showing that in New York the matter is controlled by statute and in four states the power is denied, namely: Illinois, Massachusetts, Texas and Montana. They quote approvingly a Minnesota case as follows:

"It is allowed the plaintiff in such cases to call in as many friendly physicians as he pleases and have them examine his person and then produce them as expert witnesses upon the trial, but at the same time it denies the defendant the right in any case to have a physical examination of plaintiff's person, and leaves him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for a moment."

From an Illinois case as follows:

"When serious and permanent injuries are claimed by the plaintiff and he or she has submitted to an examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify the refusal of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant on the other, the law will not hesitate; the court in making such orders in respect to time, place and person in every case having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit."

USE OF WORDS.

One of the common faults of experts is the desire to use many technical words, and thus confuse court and jury.

In a case mentioned by Gilbert Stewart in his work on "Legal Medicine," a surgeon was called to testify on a trial for assult. He stated that he found the injured man "suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissues which were in a state of tumidity." Now, of course, after a jury has listened to such a description, it would seem that the patient was about to die or that his condition was exceedingly dangerous, while, as a matter of fact, the eminent follower of Hippocrates was describing a common ailment, which in the vernacular we call "a black eye."

SUGGESTED REFORM.

Dr. Walton, a celebrated surgeon, writing in a Boston medical journal, said: "I think one of the dangers in giving expert testimony is the tendency for the expert to feel that he carries the whole case on his own shoulders, and must decide questions that ought to be left to the jury. . . . Finally, the scientific witness should come into court with clean hands and a pure heart, with sincerity of purpose, with a tendency and desire to ascertain and recognize truth whenever it may be found; to conceal nothing, mindful of his oath, which requires him to speak not only the truth, but the whole truth."

Dr. Wilbur of Syracuse, New York, said: "Expert testimony should be the colorless light of science brought to bear upon any case where summoned. It should be impartial and unprejudiced."

Among the reforms proposed by physicians might be mentioned those of Dr. E. W. Taylor of Boston, who urged experts as follows:

"1st. To refuse to testify upon the contingent basis.

"2d. To decline to prompt lawyers in the examination of other experts.

"3d. To maintain an inflexible determination to state the truth as he sees it."

From my own experience and from talking with judges, it would seem that a great many of the evils could be eliminated by the appointment of a commission of experts, to be selected by a judge of the county in which the case is tried, or by the presiding judge in a county like Los Angeles where we have twelve judges. This commission to have no connection with any public utility corporation or those establishments where personal injury actions are frequently originated and fostered. A commission would be better than one doctor, because we must recognize the honest difference of opinion—even among experts!

This plan of a commission, by the way, has been favored by the Harvard Law Review and other legal periodicals.

Hon. G. A. Endlich, a noted Pennsylvania jurist, in an address before the Law Academy of Philadelphia, suggested the following:

"1st. Formation of a stricter definition of expert capacity.

"2d. The reasonable limitation of the number of experts to be called in any case.

"3d. The payment of expert witnesses out of the public treasury, at least, in the first instance."

By making experts the appointees of the court, and their compensation not only sure but independent of the effect of their testimony, a prominent cause of supposed and often of actual bias would be eliminated.

In Michigan there is a statute limiting, in cases other than prosecutions for homicide, the number of expert witnesses who may be called by a side to three.

A Rhode Island statute provides for the appointment, on motion of any party, of an expert whose fees may be taxed as costs against the losing party, who shall make a report to the court and be thereafter examined at the trial.

An act to regulate medical expert testimony was introduced in the Legislature of Massachusetts in 1908. It was prepared by a joint committee of the Massachusetts Medical Society and the Boston Bar Association.

It covers the ground so well I want you to listen to the reading of it:

"1. At any time during the pendency of any action, suit or proceedings, civil or criminal, the court or any justice thereof in chambers, or in vacation, in any county, on his own motion may, and at the request of either party shall, appoint one or more persons, learned in the science of medicine, of not less than five years' actual practice thereof, and recommended as hereinafter provided by the leading incorporated medical society of the commonwealth as official medical or surgical expert advisers, who shall investigate the facts of the case and give their expert opinion on any material professional question arising therein and make written report thereon to the court.

"2. Such report shall be opened and filed in the case and shall have the same effect (and the parties shall have the same rights with reference thereto) as now given to the report of an auditor appointed by the court. Such expert upon the trial of the case may be called as a witness by either party.

"3. The Massachusetts Medical Society, the Massachusetts Homeopathic Medical Society and the Massachusetts Eclectic Medical Society shall each through their respective governing bodies, annually before the first day of October, furnish to the Chief Justice of the Superior Court a list of not less than fifty names of physicians of good professional standing in the various counties in their profession, whom they recommend as competent to serve as such expert witnesses, designating the specialty in which they are deemed to be experts, and giving their addresses, which lists shall be posted in the clerks' offices of the several courts.

"4. Upon such appointment by the court, or if the parties file an agreement designating an expert for the case, the clerk shall issue an order to the person so appointed or agreed upon, to be served in the manner provided by law for the service of subpœnæs. As soon as may be after service thereof, the expert witness shall make such examination of the case as in his judgment may be necessary and practicable, and shall file his report thereon as above provided.

"5. Such witness shall be paid for his services a reasonable compensation, to be allowed by the court and paid out of the treasury of the county. In all civil actions and proceedings the defeated party shall be liable to refund the amount so disbursed, including the service of the order, and after final judgment in the cause, execution may issue against him therefor in favor of the County Commissioners, or in the county of Suffolk of the city of Boston.

"6. Either party may call other medical witnesses than those designated by the court, but at his own expense, and only the ordinary witness fee allowed by law shall be taxed against the defeated party for such additional witnesses.

"7. The refusal of any person to be examined by a physician appointed as herein provided shall be admissible in evidence.

"8. This act shall take effect upon its passage."

Let us hope that if the Bar Associations and Medical Societies of California propose statutes to our Legislature that they will meet with a better fate.

(*To be concluded in the October issue.*)